(7)

No. 90-1491

In The

Supreme Court of the United States

October Term, 1991

UNION BANK,

Petitioner,

vs.

HERBERT WOLAS, Chapter 7 Trustee for the Estate of ZZZZ BEST CO., INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ROBERT MORRIS ASSOCIATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Robert Morris Associates submits this *amicus curiae* brief in support of the Petitioner in this case, with the written consent of both Petitioner and Respondent.

Robert Morris Associates is a national association of bank loan and credit officers. Its membership numbers nearly 3,000 banks and thrifts, and represents 75% of all commercial and industrial loans extended by the United States banking industry. The purpose of Robert Morris Associates is to foster superior standards and performance in the practice and management of lending and credit activities.

Long term lenders, including the nation's commercial banks, will be severely disadvantaged by the precedent established by the Ninth Circuit's decision, and if that precedent stands, banks will have to factor into their assessment of credit risk an element of additional loss. Since that would be difficult in all cases and impossible in some, the cost of borrowing would be increased, or credit would be denied. There is no indication that any such result was intended by Congress, and Robert Morris Associates believes that Congress, not the judiciary, should establish the national bankruptcy policies which have such significant repercussions for both borrowers and lenders.

STATUTES INVOLVED

This case requires interpretation of Section 547 of the Bankruptcy Code.

Section 547(b) (the "preference provision") provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would have received if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 547(c)(2) (the "ordinary course of business exception" or the "ordinary course of business defense") provides:

The trustee may not avoid under this section a transfer –

. . . .

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

Section 547(c)(2) of the Bankruptcy Code was amended in 1984. Prior to amendment, Section 547(c) contained an additional provision (the "45-day rule"), which provided:

(2) to the extent that such transfer was . . .

(B) made not later than 45 days after such debt was incurred . . .

Congress deleted former Subsection 547(c)(2)(B) in its entirety by the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments").

SUMMARY OF THE ARGUMENT

The Ninth Circuit is in error when it holds that, as a matter of law, the ordinary course of business exception to preference avoidance does not extend to payments made on long term debt, notwithstanding the plain meaning of the statute. Since its amendment in 1984, Section 547(c)(2) of the Bankruptcy Code has contained no language that distinguishes between long and short term debt. As such, the plain meaning of the statute is that the defense now applies equally to all creditors, regardless of the nature of the indebtedness.

Removing the time limit from the ordinary course defense, thereby extending the defense to payment on all debt both short and long term, is not at odds with the intention of the drafters of the Bankruptcy Code. The purpose of preference law is to provide equitable distribution to creditors and to encourage extension of credit to potential debtors. The purpose of the ordinary course of business exception to preference recovery is to preserve normal financial relations. The preservation of normal financial relations does not conflict with the purposes of equitable distribution and credit extension, but merely limits their application. The current restrictions on the ordinary course defense which remain after the deletion of the 45-day rule balance these policy objectives *and* realize the intentions of the drafters of the Bankruptcy Code.

This Court should apply its recent analysis of the plain meaning rule and the Bankruptcy Code, in *Toibb v. Radloff*, 59 U.S.L.W. 4633 (1991) and *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), to this case. The Ninth Circuit incorrectly recognized an exception to the plain meaning rule in interpreting the Bankruptcy Code. This exception provides that courts should not interpret the Code to change longstanding principles of bankruptcy law created by the courts unless Congress indicates an intent to change the law. In this case, a plain reading of the statute does not improperly preempt states' rights, expand bankruptcy avoidance powers, or change longstanding or judicially created principles of bankruptcy law. Furthermore, the plain meaning of the deletion of the 45-day rule is sufficient evidence of Congress' intent to change the law.

The courts should not read a distinction between long and short term debt into the plain meaning of the statute because any distinction depends on policy determinations better left to the legislature. Congress was familiar with a broad spectrum of distinctions between long term and short term debt, but did not elect to include *any* of these distinctions when it amended the statute. Congress is in a better position than the courts to decide if any distinction belongs in the statute, and it chose *not* to include such a distinction in enacting the 1984 Amendments that eliminated the 45-day rule.

Courts and commentators have read a multiplicity of conflicting and inconsistent distinctions into the statute. This confusion certainly does not further any important bankruptcy policies and is at odds with the intent of the drafters. This Court should enforce the plain meaning of the statutory language that Congress has provided and eliminate the long term – short term distinction now plaguing the interpretation of the Bankruptcy Code.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE APPLIES EQUALLY TO ALL CREDITORS.

A. The Plain Meaning of the Amended Statute Removes All Distinction Between Long Term Debt and Short Term Debt from Section 547(c)(2) of the Bankruptcy Code.

The Ninth Circuit has held as a matter of law that the ordinary course of business exception to preference recovery does not extend to payments made on long term

debt. *In re ZZZZ Best*, 921 F.2d 968, 969 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3769 (1991); *Matter of CHG International, Inc.*, 897 F.2d 1479, 1482 (9th Cir. 1990). The question before the Court is whether Section 547(c)(2) of the Bankruptcy Code distinguishes between long term debt and short term debt. The plain meaning of Section 547 answers this question. Since the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-433, 98 Stat. 333, Section 547 has contained no limiting language on the type of debt protected by the ordinary course of business defense to preference recovery. The defense now applies equally to all creditors, regardless of the type of debt involved, if the creditor satisfies the requirements of Section 547(c)(2)(A)-(C) of the Bankruptcy Code.

The plain meaning rule of statutory construction requires that statutory interpretation begin with the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). Only if the statutory language is unclear should the Court look to legislative history. *Toibb v. Radloff*, 59 U.S.L.W. 4633, 4634 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). The language of Section 547(c)(2), which defines payments to be excluded from the ordinary course exception on the basis of the type of debt or the repayment terms, is not unclear. There is *no* language in the statute purporting to create this distinction, and the natural interpretation therefore must be that the statute does not create such a distinction.

No one now argues that, as the result of the deletion of 45-day rule from the ordinary course of business exception, the rule still applies. The holding of the Ninth Circuit, however, assumes that Congress intended to

retain a distinction between short term and long term debt in the statute, despite Congress' refusal to replace the 45-day rule with any other time limitation. The Ninth Circuit errs in assuming this distinction, because Congress knows how to write limiting language into the Bankruptcy Code if that is its intent. *See, e.g., Toibb*, 59 U.S.L.W. at 4634 (Congress knows how to restrict access to bankruptcy relief); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, n.5 at 242 (1989) (if Congress intended to limit application of Code provision, it would have clarified by using specific phrase). *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (when Congress wants to preserve a right, it does so expressly). If Congress did not want the deletion to result in the elimination of the concept of short term debt from Section 547(c)(2), Congress could have included a proviso to that effect. *See, e.g., National Woodworkers Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 632 (1967) (Congress maintains important distinction after deletion of limiting language by adding additional limiting language in same section).

If Congress had written an alternative time limit or a vaguely worded distinction between short and long term debt into the statute to replace the 45-day rule, the resulting statutory language might have been unclear. Indeed, the struggle of the courts to define long term and short term debt (despite the absence of those terms in the statute) suggests that these terms do not have a plain meaning. While almost any word or phrase might be held to be ambiguous, deletion and the resulting *absence* of words are subject to far less misinterpretation.

The total deletion of a statutory provision is not likely to be simply an omission. Even if, however, the

absence of limiting language to replace the deleted 45-day rule in the amended statute represents a congressional oversight, it is not the role of the judiciary to write limiting language back into the statute. If Congress merely "forgot" to define the difference between long term and short term debt in the ordinary course exception, the courts should not ask how Congress would have defined it had they actually considered the question. *West Virginia University Hospitals v. Casey,* 59 U.S.L.W. 4180, 4185 (1991) (when issue is merely difference between more parsimonious policy of earlier enactment and more generous policy of later one, judges should not prescribe one policy on basis of congressional "forgetfulness"). Instead, this Court should acknowledge that a straightforward reading of the amended statute extends the ordinary course defense to all creditors if they satisfy the remaining statutory requirements.

The Ninth Circuit held that, despite the fact that Congress has deleted the limiting language in Section 547(c)(2), the statute continues to impose a short term debt limitation, because protection of long term creditors would be against congressional bankruptcy policy. *Matter of CHG International, Inc.*, 897 F.2d at 1485. In rare cases, the literal application of a statute may produce a result demonstrably at odds with the intentions of its drafters, and in those cases the drafters' intentions must be controlling. *Ron Pair,* 489 U.S. at 242 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). In this case, however, the result of the literal application of the amended language of Section 547 is that all debt payments that are made in the ordinary course of business

are protected from preference actions by a trustee, and this result does *not* defeat the intentions of Congress when it enacted the Bankruptcy Code.

B. Removing the Time Limit is Not at Odds With the Intentions of the Drafters of the Bankruptcy Code.

The Ninth Circuit holds that the removal of all distinctions between long and short term debt undermines congressional policies underlying the preference provisions of the Bankruptcy Code. *Matter of CHG International, Inc.*, 897 F.2d at 1482-83. This view misinterprets the intention of the Bankruptcy Code's drafters. The inclusion of all payments to creditors which have been made in the ordinary course of business (as measured by the statutory requirements of 547(c)(2)) does not undermine the bankruptcy policies which Congress sought to advance in the 1978 Bankruptcy Code by enacting the ordinary course exception to preferences, the preference powers themselves, or the Bankruptcy Code as a whole.

The enactment of the Bankruptcy Code did not merely codify existing bankruptcy law on preference avoidance, but worked significant changes in this area. No distinction between long term and short term debt existed under the Bankruptcy Act, under which payments to creditors were not avoidable as preferences unless the creditor had "reasonable cause to believe" that the debtor was insolvent and the debtor could demonstrate that it was insolvent at the time of the transfer. 11 U.S.C. §60(a) (repealed 1978). As such, under the Act, payments on *both*

long term and short term debt could be protected from preference recovery.[1]

The "reason to believe" standard was onerous and Congress specifically intended to remove it from bankruptcy law when it enacted the 1978 Bankruptcy Code. H.R. Rep. No. 595, 95th Cong., 1st Sess. 178-79 (1977). To do so, Congress devised a new structure for the preference statute. Under the 1978 Bankruptcy Code, knowledge of the debtor's insolvency was no longer relevant and the debtor was presumed insolvent. Pre-bankruptcy payments were presumed to be preferences if the other statutory elements were satisfied. Congress created a series of defenses as a limitation to preference avoidance to replace the subjective "reasonable cause to believe" limit and the trustee's burden of proof of insolvency in the Act.[2]

The plain language of Section 547(c)(2) after the 1984 Amendments does not defeat the intent of Congress in

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[1] Even if a creditor had "reasonable cause to believe" that the debtor was insolvent and still accepted payment, bankruptcy courts provided further protection by developing the "current expense" rule. The rule allowed payments for current operating expenses of the debtor to be exempted from preference treatment. The current expense defense by its terms applied almost exclusively to trade creditors.

[2] These defenses include the "contemporaneous exchange" defense, 11 U.S.C. §547(c)(1), the "new value" defenses, 11 U.S.C. 547(c)(3) and (4), the "inventory" defense, 11 U.S.C. §547(c)(5), the "statutory lien" defense, 11 U.S.C. §547(c)(6), the "consumer" defense, 11 U.S.C. §547(c)(7), and "the ordinary course of business" defense, 11 U.S.C. §547(c)(2).

granting preference powers to the trustee. The Ninth Circuit states that the preference provisions were intended to further the policy of equitable distribution to creditors of a bankruptcy estate. *Matter of CHG International, Inc.*, 897 F.2d at 1482. However, the principle of equitable distribution taken to its extreme would require that all pre-bankruptcy payments should be preferences, because *any* payment to a creditor benefits that creditor to the detriment of other creditors who will be paid less upon liquidation of the bankrupt estate.

Obviously, Congress did not intend this one policy to prevail to the exclusion of other important bankruptcy policies. This is evident from Section 547(c), which provides several exceptions to preference avoidance, including the ordinary course exception. All of these exceptions protect payments to creditors made within ninety days[3] before the bankruptcy filing. These exceptions embody a separate but equally important bankruptcy policy that bankruptcy avoidance powers should not disturb normal financial relations. H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977), *reprinted in* App. 2 Collier on Bankruptcy ch. II (15th ed. 1990); S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* App. 3 Collier on Bankruptcy ch. V (15th ed. 1990). The sum effect of these exceptions is that many transactions are excluded from preference attack.[4]

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[3] Payments made up to one year prior to bankruptcy filing to *insiders* are eligible for preference recovery. 11 U.S.C. §547(b)(4)(A).

[4] *See, e.g., Levit v. Ingersoll Rand Financial Corp.* (*In re DePrizio*), 874 F.2d 1186, 1199 (7th Cir. 1989) (most ordinary commercial transactions exempt from recovery under Section 547).

Another purpose that the courts ascribe to the preference provisions is to encourage extension of credit to potential debtors to forestall the slide into bankruptcy. The Ninth Circuit concluded that making long term debt eligible for ordinary course treatment does not further this policy. *Matter of CHG International, Inc.*, 897 F.2d at 1483. No showing has been made, however, that short term credit is the only credit that a financially distressed company requires to avoid the slide into bankruptcy. Nothing in the legislative history of the 1978 Bankruptcy Code or the 1984 Amendments compels the conclusion reached by the Ninth Circuit that the continuation of a debtor's long term debt relationships will not aid the debtor in avoiding a slide into bankruptcy.

Congress intended the ordinary course exception to preserve normal financial arrangements and to protect the bankrupt estate from diminution due to extraordinary measures taken by either creditor or debtor in response to the debtor's deteriorating financial condition. H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977), *reprinted in* App. 2 COLLIER ON BANKRUPTCY ch. II (15th ed. 1990); S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* App. 3 COLLIER ON BANKRUPTCY ch. V (15th ed. 1990). The plain language of Section 547(c)(2) does not defeat Congress' original intent in drafting the ordinary course of business exception. By creating the ordinary course defense (in addition to the numerous other defenses to preference actions), Congress intended preference avoidance by the trustee to be the exception, not the normal treatment of payment to creditors during the period prior to the filing of a bankruptcy case.

The implied rationale of the Ninth Circuit's ruling is that the elimination of any distinction between long and short term debt will cause the ordinary course exception to "swallow" the preference powers of the trustee. But the ordinary course exception to the preference provision, as it is now written, does not protect *all* payments to creditors in satisfaction of long or short term debt. The remaining requirements of the ordinary course exception continue to define the boundaries of the exception. If payments on long term debt do not satisfy *all three* elements of the ordinary course exception, such payments will not be protected by Section 547(c)(2). Consequently, elimination of the 45-day rule *more accurately* reflects the congressional intent of deterring only exceptional, bankruptcy-driven transfers than the former 45-day limitation.

Congress may seek to achieve more than one purpose in drafting provisions of the Bankruptcy Code. *Toibb v. Radloff*, 59 U.S.L.W. at 4635. The purpose of preserving normal financial relations does not conflict with the policies of equitable distribution to creditors and encouragement of short term credit, but merely *limits* their application. Thus, application of Section 547(c)(2) according to its plain meaning accurately implements the legislative policy behind the ordinary course exception.

C. The Analysis of the Plain Meaning Rule in *Toibb* and *Ron Pair* Applies to this Case.

The Ninth Circuit reaches its holding that Section 547(c)(2) applies only to payments on short term debt by attempting to apply an exception to the plain meaning rule. *Matter of CHG International, Inc.*, 897 F.2d at 1484

(significant shift in congressional policy not presumed without legislative history as to intent). This exception, as applied to the Bankruptcy Code, requires that courts should not interpret the Bankruptcy Code to change longstanding principles of bankruptcy law created by the courts unless Congress indicates its intent to change the law.[5] This exception to the plain meaning rule does not apply to this case for two reasons. First, the distinction between short and long term debt is neither judicially created nor of long standing. The short term debt limitation was an innovation introduced by the drafters of the 1978 Bankruptcy Code. Second, the deletion of *any* reference to time limits in the amended statute is a sufficiently explicit indicator that Congress intended to change the law to eliminate any distinction between long and short term debt.

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), a bankruptcy trustee sought to abandon property of the estate in contravention of state environmental laws. The Court declined to apply the plain meaning of the abandonment provisions of the Bankruptcy Code, and held that, without evidence of specific congressional intent to change the law, the Bankruptcy Code should not be applied to lift long-standing judicial restrictions on the trustee's abandonment powers, thereby granting a bankruptcy trustee "an extraordinary exemption from non-bankruptcy law." 474 U.S. at 501.

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[5] *See, e.g., United Savings Associates of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988) (major change in existing rules is unlikely without specific provision in text of statute); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, n. 3 at 203 (1988) (judicially created exception to absolute priority rule may survive codification by Congress).

In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court addressed the exclusion of criminal fines from discharge in bankruptcy. This exclusion appeared nowhere in the language of the Act. However, the Court noted, "despite the clear statutory language [of the Act] [discharging criminal fines], most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." 479 U.S. at 45. This became a widely accepted judicial exception to the language of the Bankruptcy Code as well. 479 U.S. at 46. The Court held that "in light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe [reading the exception into the Code] best effectuates the will of Congress." 479 U.S. at 53.

The justification used by the Court in *Kelly* and *Midlantic* for reading language into the Bankruptcy Code not expressly stated in the statute does not apply to the ordinary course exception, as amended by the 1984 Amendments, at issue in this case. First, increased protection of creditors' rights under federal bankruptcy law does not intrude on the interests of the states or grant the debtor "an extraordinary exemption from non-bankruptcy law." Second, long term debt has not been excluded from protection as a longstanding or judicially created construction of preference law. To the contrary, prior to enactment of the Bankruptcy Code, payments on long term debt were not routinely treated as preferences because under the Act the distinguishing factor was "reasonable cause to know." This distinction was intentionally eliminated by enactment of the Bankruptcy Code

and introduction of a new statutory scheme: a presumption of insolvency and therefore a presumption of preference, limited by several defenses. Pre-Code practice is not relevant in this case, as it was in *Kelly* and *Midlantic*, because the Bankruptcy Code had already explicitly changed the preference law.

Kelly further requires significant evidence that Congress intended to change the law. Congress has changed the preference law twice, first with the enactment of the Bankruptcy Code, which limited the ordinary course exception to extremely short term debt, and again with the 1984 Amendments, when the 45-day limitation was removed. Deletion of the 45-day rule without *any* limiting language to replace it is significant evidence that Congress intended to eliminate any distinction between short and long term debt.

In *United States v. Ron Pair Enterprises, Inc.*, the Court delineated the limits of the exception to the plain meaning rule applied in *Kelly* and *Midlantic*, in interpreting the plain meaning of Section 506 of the Bankruptcy Code which provides for post petition interest on secured claims. The Court noted that *Kelly* and *Midlantic* involved:

> statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in clear conflict with state or federal laws of great importance. In the present case, in contrast, the language in question is clearer than the language at issue in *Midlantic* and *Kelly*: as written it directs that postpetition interest be paid on all oversecured claims. In addition, this natural interpretation of the statutory language does not conflict with any significant state or federal interest, nor with any other aspect of the Code. Although the payment of postpetition interest is arguably somewhat in tension with the desirability of paying all creditors as uniformly as practicable, Congress expressly chose to create that alleged tension. *There is no reason to suspect that Congress did not mean what the language of the statute says.*

489 U.S. at 245-46 (emphasis added).

In *Toibb v. Radloff*, the Court recently examined and applied the plain meaning rule again in interpreting the Bankruptcy Code. In *Toibb*, the Court held that individual debtors are eligible to file for relief under Chapter 11, because the language of Section 109 of the Bankruptcy Code does not expressly exclude individuals from Chapter 11 eligibility. 59 U.S.L.W. at 4634. In response to the argument that the legislative history did not affirmatively reflect Congress' intent to include individual debtors in Chapter 11, the Court held that the legislative history need not affirmatively reflect legislative intent where the plain language of the statute itself evinces the intent.[6] 59 U.S.L.W. at 4635.

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[6] *See also Pennsylvania Dept. of Public Welfare v. Davenport*, 58 U.S.L.W. 4610 (1990), where the Court overrode a judicially created exception to the Bankruptcy Code because the plain language of the statute indicated Congress' intent. 58 U.S.L.W. at 4613.

The Court's application of the plain meaning rule to the Bankruptcy Code in *Ron Pair* and *Toibb* more accurately interprets the amended ordinary course exception than the restrictive approach that the Court took in *Kelly* and *Midlantic*. The 45-day rule was not bankruptcy law of long standing; it was an innovation of the 1978 Bankruptcy Code. By eliminating the 45-day rule entirely from the statute and not replacing it, Congress sent a clear signal that the ordinary course exception no longer makes any distinction between long and short term debt.

II. THIS COURT SHOULD NOT ENGAGE IN JUDICIAL LEGISLATION BY DEFINING LONG TERM DEBT.

A. Congress Must Balance Interests and Formulate Policy.

It is well established that it is the exclusive province of Congress to formulate policies and balance competing interests in enacting legislation. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Unlike Congress, the courts do not have the expert knowledge, resources, i procedures to investigate and weigh competing interests and enact policy initiatives. 437 U.S. at 194. Even where a sound policy basis exists for reading limiting language into a statute, it is Congress which must rewrite the statute, and it is unjustifiable for the courts to attempt to do so by a process of "judicial legislation." *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 78 (1985) (quoting *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 340 (1987)). *See also Offshore Logistics v. Tallentire*, 477 U.S. 207, 238 (1986). As noted by this Court in *Fiallo v. Bell*, 430 U.S. 787 (1977):

> With respect to . . . these legislative policy distinctions, it could be argued that the line should be drawn at a different point . . . but these are policy questions entrusted exclusively to the political branches of our government, and we have no judicial authority to substitute our political judgment for that of Congress.

430 U.S. at 798.

Both commentators and courts, including the Ninth Circuit, have embraced the view that because commercial paper, consumer debt, and trade groups were the focus of debate between 1978 and 1984 on whether to remove the 45-day rule,[7] a limitation on the ordinary cause exception should be inferred from the statute, notwithstanding the deletion of the 45-day rule in its entirety without qualification. In fact, a reading of the statute and review of the legislative history of the 1984 Amendments simply does not support such an interpretation.

In this case, although it is clear that Congress intended to leave normal financial relations undisturbed by enacting the ordinary cause exception, Congress has not determined which types of debt, *if any*, should be excluded from the exception if the debt was incurred in the debtor's normal financial relations. The 45-day rule, enacted as part of the ordinary course exception in the 1978 Bankruptcy Code, resulted in extensive litigation,[8]

[7] *Matter of CHG International, Inc.*, 897 F.2d at 1484; Broome, Lisa Lampkins, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L. J. 78, 100 (1987).

[8] *See, e.g., In re Iowa Premium Service Co., Inc.*, 695 F.2d 1109 (8th Cir. 1982); *Barash v. Public Finance Corporation*, 658 F.2d 504 (7th Cir. 1981).

and various constituencies lodged complaints with Congress, requesting a change or deletion of the 45-day rule.

Trade groups argued that, although the 45-day limit apparently was chosen because it reflected the "normal billing cycle," it did not reflect the actual billing cycle for many industries.[9] In response to such concerns, Congress could have extended the 45-day period to 90, 100, or 120 days to encompass such industry business cycles, but it did not choose to do so.

Short term unsecured debt obligations, such as commercial paper, were also constrained by the 45-day rule. Maturities of commercial paper, which are typically of up to 270 days,[10] now were shortened to 45 days as a result of the rule. If Congress intended to except only trade and short term debt transactions from preference avoidance, it could have amended Section 547(c)(2) to extend the 45-day period to 270 days. However, Congress decided not to do so.

Various proposals were introduced in Congress prior to the 1984 Amendments to eliminate the problems caused by the 45-day rule, including (i) eliminating the 45-day rule altogether; (ii) reinserting the "reasonable

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[9] *See* Broome, 1987 DUKE L. J. at 99 n. 100 (1987) (45 days selected as normal cycle); DeSimone, David J., *Section 547(c)(2) of the Bankruptcy Code; The Ordinary Course Without the 45-Day Rule*, 20 AKRON L. REV. 95, 111 (1986) (45 days not normal cycle in many industries).

[10] Broome, 1987 DUKE L. J. at 103 n. 116 (1987).

cause to believe" requirement included in the preference provision of the Bankruptcy Act; (iii) providing a separate exception for payments made on commercial paper or other short term obligations; and (iv) providing a separate exception for consumer installment debt.[11] Instead of enlarging the 45-day period or adopting an alternative proposal to protect specific types of debt, Congress simply enacted the 1984 Amendments providing for the deletion of the 45-day rule in its entirety. The legislative history of the 1984 Amendments provides *no* explanation of Congress' decision to delete the 45-day limitation on the ordinary course exception rather than adopt other proposals which sought to protect only certain types of debt.

Given that the legislative history does not contain an explicit statement of why Congress deleted the 45-day rule, it is inappropriate for the Court to decide that Congress intended a result that Congress expressly declined to enact. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. at 238 (Powell, J., dissenting), (quoting *Gulf Oil Corp v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). It is clear that the ordinary course exception, as presently enacted, without a distinction between "trade" and "non-trade" debt, or "short" and "long term" debt, is consistent with the original legislative policy underlying the ordinary course exception – to leave undisturbed the normal financial relations of the financially-distressed debtor.

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[11] DeSimone, 20 AKRON L. REV. at 131 (1986).

B. Failure to Read the Plain Meaning of Section 547(c)(2) of the Bankruptcy Code Has Resulted in Inconsistent Judicial Interpretations.

In enacting Section 547 of the 1978 Bankruptcy Code, Congress, failed to define various statutory terms such as "ordinary course of business," "ordinary business terms," and when a debt is "incurred." Consequently, the courts have had to define these terms in interpreting and enforcing the preference provisions of the Bankruptcy Code. Substantial litigation has resulted concerning the meaning and scope of these terms. However, the 1984 Amendments did not further define any of these terms. In particular, it did not replace the 45-day rule with a limitation on the ordinary course exception to "trade debt" or "short term debt." Judicial deference to the legislature is appropriate, especially where Congress intentionally deleted the time limitation without substituting a new limitation on the *type* of obligation exempted from the ordinary course exception.

Unfortunately, many courts have not deferred to the plain meaning of the statute, nor have they deferred to Congress to modify the ordinary course exception if Congress believes such a change is necessary. Judicial decisions since the 1984 Amendments have read into the statute a limitation based on the nature of the debt and the terms for repayment.[12] In the case at bar, the Ninth

[12] *See, e.g., Fidelity Savings & Investment Co. v. New Hope Baptist*, 880 F.2d 1172 (10th Cir. 1989); *In re Finn*, 909 F.2d 903 (6th Cir. 1990); *In re Control Electric, Inc.*, 91 B.R. 1010 (Bankr. N.D. Ga. 1988); *In re Bourgeois*, 58 B.R. 637 (Bankr. W.D. La. 1986).

Circuit did not define what constitutes short term debt, but held, without explanation, that a eight month bank line of credit does not qualify.[13]

Petitioner argues that, should this Court define long term debt, a one-year period is appropriate. Robert Morris Associates submits that, if some time period is to be specified, the Court should defer to Congress, which as the legislature is better suited to weigh various competing policy interests. A plain meaning interpretation of the statute will discourage the inconsistent judicial rulings that, in this case and others, result from courts attempting to legislate. Congress can address further limitations on the ordinary course exception by corrective amendments to the statute, should it determine further refinements are necessary.

CONCLUSION

Advocates of the plain meaning rule are often faulted for literalism, which may deny the true purpose of a statute. Literalism may be a fair criticism of an overly narrow reading of words inserted or left in a statute upon amendment. If the Court refuses to read in, or more accurately, refuses to read *back* into the statute words and meanings that Congress has *intentionally* deleted, the Court cannot be faulted for literalism. Robert Morris

[13] *In re ZZZZ Best Co., Inc.*, 921 F.2d 968, 969 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3769 (1991).

Associates submits that this Court should interpret Section 547(c)(2) according to its plain meaning, and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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